AUG 18 1958
CHARLES ELMORE CROPL
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 254

NORFOLK SOUTHERN BUS CORPORATION
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

JAMES G. MARTIN,
Counsel for Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA
THREE JUDGE COURT SITTING

Civil Action No. 1084

NORFOLK SOUTHERN BUS CORPORATION
Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Defendants

STATEMENT PURSUANT TO PARAGRAPH 1 OF RULE 12 OF SUPREME COURT

The basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in question in this case is pursuant to Section 1253 of Title 28 of the United States Code, which allows direct appeals from decision of Three Judge Courts from orders granting or denying injunctions in Civil Actions.

The nature of the case was to enjoin the rulings of the Interstate Commerce Commission taking off a restriction on operation by the Virginia Dare Transportation Company, Incorporated, by the removal of which restriction the rights of Norfolk Southern Bus Corporation were greatly damaged and Virginia Dare Transportation Company, Incorporated was allowed to compete directly with

Norfolk Southern Bus Corporation between Norfolk, Virginia and Elizabeth City, North Carolina.

Norfolk Southern Bus Corporation claimed that the decision and order of the Interstate Commerce Commission was null and void and was not based on substantial evidence, and did not contain findings as required by the Administrative Procedure Act, Section 8 (b); 5 U. S. C. A., Section 1007 (b), and likewise Division 5 of the Interstate Commerce Commission did not have proper findings to comply with said statute, nor was it based on substantial evidence.

The Three Judge Court, one Judge dissenting, refused injunction and dismissed the complaint by its order entered on the 14th day of June, 1950.

NORFOLK SOUTHERN BUS CORPORATION,
By JAS. G. MARTIN,
Of Counsel.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA,
NORFOLK DIVISION

Civil Action No. 1084

NORFOLK SOUTHERN BUS CORPORATION,
Plaintiff,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Defendants

Received and Filed May 26, 1950. Walkley E. Johnson, Clerk; Ruby S. LaGourgue, Deputy Clerk.

(Argued March 27, 1950, Decided —— ——)

Before DOBIE, Circuit Judge, and HUTCHESON and BRYAN, District Judges.

James G. Martin, S. Burnell Bragg and Arthur J. Winder, Attorneys for the Plaintiff.

George R. Humrickhouse, U. S. Attorney.

Edward M. Reidy, Associate Chief Counsel, Interstate Commerce Commission.

Willard R. Ashburn, Attorney for Virginia Dare Transportation Co. Inc.

I. M. Bailey, Attorney for Virginia Dare Transportation Co. Inc.

DOBIE, *Circuit Judge:*

Plaintiff, Norfolk Southern Bus Corporation, instituted this civil action against the defendants, United States of America, Interstate Commerce Commission and Virginia Dare Transportation Company, Incorporated, on December 22, 1949, seeking to set aside and annul an order of the Commission dated November 7, 1949, and to enjoin the issuance by the Commission to Virginia Dare of a certificate of public convenience and necessity pursuant to this order. Norfolk Southern, a Virginia corporation with its principal office in Norfolk, Virginia, is a common carrier of passengers by motor vehicle between Norfolk and Elizabeth City, North Carolina. Virginia Dare is a North Carolina corporation, with its principal office in Manteo, North Carolina, and formerly operated as a common carrier of passengers by motor vehicle between Manteo, Sligo and Elizabeth City, all in North Carolina.

On December 5, 1946, the Commission granted Virginia Dare (46 M. C. C. 842) authority to transport passengers and their baggage, and mail, express and newspapers, in the same motor vehicle with passengers, between Sligo, North Carolina, and Norfolk, Virginia, over North Carolina-Virginia Highway 170 serving Moyock, North Carolina, as an intermediate point, subject to the following restriction:

> "The service authorized herein is subject to the restriction that no passengers or other traffic shall be transported between Norfolk, on the one hand, and, on the other, points on said carrier's presently authorized route between Sligo and Elizabeth City, including Elizabeth City."

This had the effect of giving Virginia Dare a through route between Manteo and Norfolk, with service at Moyock and at all points between Manteo and Sligo, inclusive, but prevented Virginia Dare from giving any service between

Norfolk, on the one hand, and, on the other, points on its route between Sligo and Elizabeth City, including the latter. An appropriate certificate was issued July 3, 1947.

In motor carrier parlance, this was known as a "closed door" operation. Upon subsequent petition of Virginia Dare, the proceeding was reopened for further hearing solely with respect to the restriction just mentioned and with respect to the question of what service, if any, should be authorized at points between Sligo and Norfolk.

Norfolk Southern protested the lifting of this restriction. Hearings were held on February 25, 1948, and May 3 and 4, 1948, at which times extensive evidence was produced by both Virginia Dare and Norfolk Southern. The matter was referred to an Examiner for a report and a recommended order. The Examiner concluded that the restriction should not be removed. Exceptions were filed by Virginia Dare to the Examiner's report. On August 15, 1949, Division 5 of the Commission, consisting of three Commissioners, issued a report reversing the Examiner, with one Commissioner dissenting. By their order of November 7, 1949, Norfolk Southern's petition for reconsideration was denied by the entire Commission, which in effect affirmed the decision of Division 5 that the restriction should be lifted.

Two main questions are presented for our determination: (1) Has the Commission made sufficient Findings of Fact upon which to base the order? and (2) Is there substantial evidence to support the order?

(1) The Commission is, of course, not bound to accept the Examiner's conclusion that the restriction should not be lifted. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285; *Hall & Sons* v. *United States*, 88 F. Supp. 596, 598. Further, there is no significance in the fact that the report, which was affirmed by the entire Commission, was made by only three Commissioners.

The authority of the Commission to issue certificates of convenience and necessity is found in § 207(a) of the Interstate Commerce Act, 49 U.S.C.A. § 307(a):

> "Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the

whole or any part of the operations covered by the application, *if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions on this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity;* otherwise such application shall be denied; * * *." (Italics ours.)

The nature and extent of the Commission's authority under the above provisions has been the subject of numerous decisions. The law thereon is settled. The issue of public convenience and necessity is a matter peculiarly requiring the exercise of the Commission's expert judgment in the field of transportation. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 482, 490. In exercising this administrative function there are no specifications of considerations by which the Commission is to be governed in determining whether public convenience and necessity require the inauguration of motor-vehicle service. As under section 1 (18) dealing with the extension and abandonment of railway lines, it is "the duty of the Commission to find the facts and in the exercise of a reasonable judgment, to determine that question." *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42; *Colorado* v. *United States*, 271 U. S. 153, 168; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 273.

In its report, Division 5 of the Commission stated, in conclusion:

> "Upon further hearing, *we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier* by motor vehicle of passengers and their baggage, and of mail, express, and newspapers, in the same vehicle with passengers, between Sligo, N.C., and Norfolk, Va., over North Carolina Highway 170 from Sligo to the North Carolina-Virginia State line, and thence over Virginia Highway

170 to Norfolk, serving all intermediate points; *that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and to our rules and regulations thereunder;* that an appropriate amended certificate should be granted, upon receipt from applicant of a request in writing for the coincidental cancellation of the certificate issued herein on July 3, 1947." (Italics ours.)

In connection with the adequacy of the findings in the Commission's report, we quote from *Chicago, B. & Q. Ry. Co.* v. *United States,* 60 F. Supp. 580, 583:

> "The principal problems with which we are confronted are whether the order of the Commission is supported by an adequate finding in respect to the basic or quasi-jurisdictional fact upon which the exercise of its statutory power depends and, if so, whether or not such essential finding rests upon a rational basis and is supported by substantial evidence of record.
>
> In United States *v.* B. & O. R. Co., 293 U. S. 454, 464, 55 S. Ct. 268, 79 L. Ed. 587, after pointing out the single primary question of fact upon which a finding by the Commission was essential to the exercise of its statutory power, the Court commented upon the distinction between findings of fact which are indispensable and others which are not essential and after referring to State of Florida *v.* United States, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291, said: 'In the Florida case the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the "complete statement of the grounds of the Commission's determination" which was declared in Beaumont, S. L. & W. Ry. Co. *v.* United States, 282 U. S. 74, 86, 51 S. Ct. 1, 75 L. Ed. 221, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the review-

ing court (compare Virginian Ry. *v.* United States, 272 U. S. 658, 675, 47 S. Ct. 222, 71 L. Ed. 463), is not fatal to the validity of the order. It is true that formal and precise findings are not required, under section 14 (1) of the Interstate Commerce Act * * *, which declares that the report "shall state the conclusions of the Commission together with its decision." Compare Manufacturers' Ry. Co. *v.* United States, 246 U. S. 457, 487, 38 S. Ct. 383, 62 L. Ed. 831; Meeker (& Co.) *v.* Lehigh Valley R. Co., 236 U. S. 412, 428, 35 S. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, P.U.R. 1915D 1072. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½ * * *. But section 14 (1) does not remove necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity." ' (293 U. S. 454, 55 S. Ct. 273.)

In the light of this authority, it appears that a finding of the ultimate basic fact is all that is indispensable to the Commission's exercise of the statutory power invoked in this proceeding. As a prerequisite to the validity of its orders, the Commission is not compelled to report special findings as to the underlying or subordinate facts such as were formerly required by Equity Rule 70½, 28 U. S. C. A. § 723 appendix, and now required by Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. The only basic or quasi-jurisdictional fact, a finding in respect to which is essential to the exercise of the statutory power of the Commission to reduce the established rate involved in this case and prescribes a lower one for the future, is the fact that the subsisting rate 'is or will be unjust or unreasonable.' Sec. 15 (1) of the Act, 49 U. S. C. A. § 15 (1)." (Italics ours.)

Even though § 8(b) of the Administrative Procedure Act, 5 U. S. C. A. § 1007(b) may now be applicable to the decisions of the Interstate Commerce Commission, we think

that the Commission's report contains findings sufficient to support the order. Section 8(b) provides:

> "* * * The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate ruling, order, sanction, relief, or denial thereof."

The Commission here made the ultimate findings as required by the statute, and these ultimate findings are supported by subsidiary findings. The Commission's report describes the authority sought by the application, the existing routes of Virginia Dare, the prior authority, subject to the restriction, granted by the Commission, the reopening of the case upon petition of Norfolk Southern, and the Examiner's conclusion. It then points out that the findings that Virginia Dare is fit and able to conduct the services at issue and that public convenience and necessity require services by Virginia Dare at all intermediate points between Sligo and Norfolk are unquestioned and justified by the record.

Interventions by public bodies were next referred to and the evidence in support of the application was summarized. The testimony of bus drivers, indicating that on numerous occasions they have been flagged at intermediate points between Elizabeth City and Sligo, by persons seeking passage to Norfolk or to points between Sligo and Norfolk, and the temporary authority under which applicant continued service for about five months between Elizabeth City and Sligo to Norfolk were referred to. The testimony of five public witnesses in support of the application was reviewed.

Next, the Commission reviewed the testimony of eighteen public witnesses appearing on behalf of protestant Norfolk Southern. Schedules showing north and southbound service

rendered by Norfolk Southern over its two routes between Norfolk and Elizabeth City are referred to. Operating and statistical exhibits introduced by the Norfolk Southern were reviewed, indicating "that there has been no appreciable overcrowding in recent months." Declining passenger revenue of the Norfolk Southern was referred to and the extent of the decline in recent years shown.

Virginia Dare's contention that it had been unduly limited in its presentation of its testimony and the scope of its cross-examination was overruled, and the Commission stated "in reaching our conclusions, we have considered all the evidence of record." The Commission's report then contains the following important holding:

> "In several instances we have stated that a 'closed door' passenger operation which prevents any part of the public from riding buses which are operated daily over a regular route is difficult to justify. Generally speaking, restrictions such as contained in applicant's certificate are not in the public interest and can be justified only by unusual circumstances which are not here present. True, Norfolk Southern is now operating at a deficit, but there is no showing that the deficit results primarily from its operations over the Norfolk-Sligo-Elizabeth City route. In our opinion, there is no convincing evidence that removal of the restriction would deprive Norfolk Southern of a material amount of traffic. In any event, we have often found that the public should not be deprived of a new or improved service merely because it might divert some traffic from other carriers. In the circumstances, we conclude that the public convenience and necessity require the rendition by applicant of an unrestricted interstate service."

There was no necessity for the Commission to make any specific finding concerning the inadequacy of the existing service. See *Davidson Transfer and Storage Co.* v. *United States*, 42 F. Supp. 215, affirmed 317 U. S. 587; *A., B. & C. Motor Transp. Co.* v. *U. S.*, 69 F. Supp. 166, 169. Sec-

tion 207(b) of the Interstate Commerce Act, 49 U. S. C. A. § 307(b), states:

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. See Chesapeake & Ohio Ry. Co. v. United States, 283 U. S. 35, 42; North Coast Transp. Co. v. United States, 54 F. Supp. 448, 451, affirmed 323 U. S. 668. Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor. Lang Transp. Corp. v. United States, 75 F. Supp. 915, 929; Inland Motor Freight v. United States, 36 F. Supp. 885.

As Circuit Judge Parker stated in Beard-Laney v. United States, 83 F. Supp. 27, 32, affirmed 338 U. S. 803:

> "It is for the Commission, not the court, to say what public convenience and necessity requires and whether these will be better served by licensing an additional carrier than by permitting those already licensed to expand their facilities."

In lifting the restriction here, the Commission was not instituting a new service but was simply permitting an improvement of an existing service. Thus the language of Hall & Sons v. United States, 88 F. Supp. 596, 602, is applicable:

> "Bearing in mind the Commission's expertness and primary responsibility in weighing the factors affecting public convenience and necessity, and the well-understood limitations on judicial review in this type of case, we cannot say, on the basis of the Commission's findings, that it was irrational to conclude that the present and future public convenience and necessity would be served by the limited enlargement of applicant's existing authority, as provided in the order.

> The word 'necessity' in the broad statutory formula must not be taken too literally, especially in a case like the present, as implying that a transportation crisis of major proportions would ensue unless the application were granted. If that were the meaning, the use of the word 'convenience' would be an obvious superfluity."

(2) The determinations of the Interstate Commerce Commission, like those of other administrative bodies, will be upheld if within the Commission's statutory power and supported by substantial evidence that the public convenience and necessity are served by the order or certificate. See Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. United States, 322 U. S. 1, 3; United States v. Wabash R. R. Co., 321 U. S. 403, 408; Interstate Commerce Commission v. Hoboken Manufacturers' R. R. Co., 320 U. S. 368, 378; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547.

The courts have also stated the rule in these words:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

Rochester Telephone Corp. v. United States, 307 U. S. 125, 146; Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 286.

In Virginian Ry. Co. v. United States, 271 U. S. 658, 666, Mr. Justice Brandeis stated:

> "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

See, also, Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 271.

In addition, there is a presumption that the Commission has properly performed its official duties, and this presumption supports its official acts. Baltimore & Ohio R. R. Co. v. United States, 298 U. S. 349, 358-9. Cf. Federal

Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 602; United States v. Chemical Foundation, 272 U. S. 1, 14-15.

The credibility of witnesses and the weight of the testimony are also for the Commission to determine and are not the concern of the courts. See Lang Transp. Co. v. United States, 75 F. Supp. 915, 930, and the authorities there cited.

Under the applicable law it is not necessary for us to present a detailed analysis of the evidence. It will suffice to state that there was evidence that the existing system caused confusion, that many people were refused transportation, that there had been complaints from passengers, that the buses of Norfolk Southern were crowded, that a petition for better services was filed and that the lifting of the restriction would remove ill feeling and afford transportation between Manteo and neighboring points and intermediate stops between Norfolk and Elizabeth City without the necessity of changing buses. This evidence is substantial and supports the Commission's order.

The injunction is denied and the suit dismissed.

Dismissed.

I concur.

STERLING HUTCHESON,
U. S. District Judge.

MAY 16, 1950.

BRYAN, *District Judge*, dissenting:

In my opinion the report of Division 5, dated August 15, 1949, is invalid because it fails to make any basic findings to sustain its ultimate finding. I cannot agree with the Court's opinion that an ultimate finding is all that is required by law; U. S. v. Pierce Auto Lines, 327 U. S. 515, 533; Hudson Transit Lines v. U. S., 82 F. Supp. 153, 155, aff. 338 U.S. 802; Administrative Procedure Act sec. 8(b), 5 U.S.C.A. 1007(b); and I search the record in vain for subordinate findings.

To be sure, there are summaries of evidence and observations. If they be taken as findings they deny the Commis-

sion's conclusion. Thus the report recites that, as to the confusion in flagging the buses, applicant's drivers say, "the tendency is for fewer persons" to do so; as to Norfolk-Southern buses, even applicant's witnesses believe them "satisfactory" although crowded "on some occasions x x x during the war years"; as to schedules, the frequency of service is shown to be ample; and as to Norfolk-Southern's deficit, it is "through no fault of its own" and it has "an expense factor below the average" and "its management x x x good and efficient". Again, the observations that "there is no showing that the deficit results from its operations" over the route in question, and "there is no convincing evidence that removal of the restriction would deprive Norfolk-Southern of a material amount of traffic" are valueless. Too obvious to need proof is the proposition that withdrawal of the restriction would neither lessen the deficit, nor lessen the decline of traffic over the Norfolk-Southern. So no penultimate "finding" sustains the ultimate.

Consequently, I can find no "rational basis" for the order. The Commission presumably had ground to impose the restriction. I would like to know its ground for cancelling it.

I would enjoin the enforcement of the present order until the Commission makes the findings required by law and enters its order thereon.

MAY 22, 1950.

FILED
AUG 18 1950
CHARLES ELMORE CROP
CLE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 254

NORFOLK SOUTHERN BUS CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

STATEMENT AS TO JURISDICTION

JAMES G. MARTIN,
Counsel for Appellant.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA
THREE JUDGE COURT SITTING

Civil Action No. 1084

NORFOLK SOUTHERN BUS CORPORATION
Plaintiff,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Defendants

STATEMENT PURSUANT TO PARAGRAPH 1 OF RULE 12 OF SUPREME COURT

The basis upon which the Supreme Court of the United States has jurisdiction upon appeal to review the judgment or decree in question in this case is pursuant to Section 1253 of Title 28 of the United States Code, which allows direct appeals from decision of Three Judge Courts from orders granting or denying injunctions in Civil Actions.

The nature of the case was to enjoin the rulings of the Interstate Commerce Commission taking off a restriction on operation by the Virginia Dare Transportation Company, Incorporated, by the removal of which restriction the rights of Norfolk Southern Bus Corporation were greatly damaged and Virginia Dare Transportation Company, Incorporated was allowed to compete directly with

Norfolk Southern Bus Corporation between Norfolk, Virginia and Elizabeth City, North Carolina.

Norfolk Southern Bus Corporation claimed that the decision and order of the Interstate Commerce Commission was null and void and was not based on substantial evidence, and did not contain findings as required by the Administrative Procedure Act, Section 8 (b); 5 U. S. C. A., Section 1007 (b), and likewise Division 5 of the Interstate Commerce Commission did not have proper findings to comply with said statute, nor was it based on substantial evidence.

The Three Judge Court, one Judge dissenting, refused injunction and dismissed the complaint by its order entered on the 14th day of June, 1950.

NORFOLK SOUTHERN BUS CORPORATION,
By JAS. G. MARTIN,
Of Counsel.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA,
NORFOLK DIVISION

Civil Action No. 1084

NORFOLK SOUTHERN BUS CORPORATION,
Plaintiff,

versus

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Defendants

Received and Filed May 26, 1950. Walkley E. Johnson, Clerk; Ruby S. LaGourgue, Deputy Clerk.

(Argued March 27, 1950, Decided —— ——)

Before DOBIE, Circuit Judge, and HUTCHESON and BRYAN, District Judges.

James G. Martin, S. Burnell Bragg and Arthur J. Winder, Attorneys for the Plaintiff.

George R. Humrickhouse, U. S. Attorney.

Edward M. Reidy, Associate Chief Counsel, Interstate Commerce Commission.

Willard R. Ashburn, Attorney for Virginia Dare Transportation Co. Inc.

I. M. Bailey, Attorney for Virginia Dare Transportation Co. Inc.

DOBIE, *Circuit Judge:*

Plaintiff, Norfolk Southern Bus Corporation, instituted this civil action against the defendants, United States of America, Interstate Commerce Commission and Virginia Dare Transportation Company, Incorporated, on December 22, 1949, seeking to set aside and annul an order of the Commission dated November 7, 1949, and to enjoin the issuance by the Commission to Virginia Dare of a certificate of public convenience and necessity pursuant to this order. Norfolk Southern, a Virginia corporation with its principal office in Norfolk, Virginia, is a common carrier of passengers by motor vehicle between Norfolk and Elizabeth City, North Carolina. Virginia Dare is a North Carolina corporation, with its principal office in Manteo, North Carolina, and formerly operated as a common carrier of passengers by motor vehicle between Manteo, Sligo and Elizabeth City, all in North Carolina.

On December 5, 1946, the Commission granted Virginia Dare (46 M. C. C. 842) authority to transport passengers and their baggage, and mail, express and newspapers, in the same motor vehicle with passengers, between Sligo, North Carolina, and Norfolk, Virginia, over North Carolina-Virginia Highway 170 serving Moyock, North Carolina, as an intermediate point, subject to the following restriction:

> "The service authorized herein is subject to the restriction that no passengers or other traffic shall be transported between Norfolk, on the one hand, and, on the other, points on said carrier's presently authorized route between Sligo and Elizabeth City, including Elizabeth City."

This had the effect of giving Virginia Dare a through route between Manteo and Norfolk, with service at Moyock and at all points between Manteo and Sligo, inclusive, but prevented Virginia Dare from giving any service between

Norfolk, on the one hand, and, on the other, points on its route between Sligo and Elizabeth City, including the latter. An appropriate certificate was issued July 3, 1947.

In motor carrier parlance, this was known as a "closed door" operation. Upon subsequent petition of Virginia Dare, the proceeding was reopened for further hearing solely with respect to the restriction just mentioned and with respect to the question of what service, if any, should be authorized at points between Sligo and Norfolk.

Norfolk Southern protested the lifting of this restriction. Hearings were held on February 25, 1948, and May 3 and 4, 1948, at which times extensive evidence was produced by both Virginia Dare and Norfolk Southern. The matter was referred to an Examiner for a report and a recommended order. The Examiner concluded that the restriction should not be removed. Exceptions were filed by Virginia Dare to the Examiner's report. On August 15, 1949, Division 5 of the Commission, consisting of three Commissioners, issued a report reversing the Examiner, with one Commissioner dissenting. By their order of November 7, 1949, Norfolk Southern's petition for reconsideration was denied by the entire Commission, which in effect affirmed the decision of Division 5 that the restriction should be lifted.

Two main questions are presented for our determination: (1) Has the Commission made sufficient Findings of Fact upon which to base the order? and (2) Is there substantial evidence to support the order?

(1) The Commission is, of course, not bound to accept the Examiner's conclusion that the restriction should not be lifted. *Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U. S. 266, 285; *Hall & Sons* v. *United States*, 88 F. Supp. 596, 598. Further, there is no significance in the fact that the report, which was affirmed by the entire Commission, was made by only three Commissioners.

The authority of the Commission to issue certificates of convenience and necessity is found in § 207(a) of the Interstate Commerce Act, 49 U.S.C.A. § 307(a):

> "Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the

whole or any part of the operations covered by the application, *if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions on this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity;* otherwise such application shall be denied; * * *." (Italics ours.)

The nature and extent of the Commission's authority under the above provisions has been the subject of numerous decisions. The law thereon is settled. The issue of public convenience and necessity is a matter peculiarly requiring the exercise of the Commission's expert judgment in the field of transportation. *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 482, 490. In exercising this administrative function there are no specifications of considerations by which the Commission is to be governed in determining whether public convenience and necessity require the inauguration of motor-vehicle service. As under section 1 (18) dealing with the extension and abandonment of railway lines, it is "the duty of the Commission to find the facts and in the exercise of a reasonable judgment, to determine that question." *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U. S. 35, 42; *Colorado* v. *United States*, 271 U. S. 153, 168; *Texas & Pacific Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U. S. 266, 273.

In its report, Division 5 of the Commission stated, in conclusion:

"Upon further hearing, *we find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier* by motor vehicle of passengers and their baggage, and of mail, express, and newspapers, in the same vehicle with passengers, between Sligo, N.C., and Norfolk, Va., over North Carolina Highway 170 from Sligo to the North Carolina-Virginia State line, and thence over Virginia Highway

170 to Norfolk, serving all intermediate points; *that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and to our rules and regulations thereunder;* that an appropriate amended certificate should be granted, upon receipt from applicant of a request in writing for the coincidental cancellation of the certificate issued herein on July 3, 1947." (Italics ours.)

In connection with the adequacy of the findings in the Commission's report, we quote from *Chicago, B. & Q. Ry. Co.* v. *United States*, 60 F. Supp. 580, 583:

"The principal problems with which we are confronted are whether the order of the Commission is supported by an adequate finding in respect to the basic or quasi-jurisdictional fact upon which the exercise of its statutory power depends and, if so, whether or not such essential finding rests upon a rational basis and is supported by substantial evidence of record.

In United States *v.* B. & O. R. Co., 293 U. S. 454, 464, 55 S. Ct. 268, 79 L. Ed. 587, after pointing out the single primary question of fact upon which a finding by the Commission was essential to the exercise of its statutory power, the Court commented upon the distinction between findings of fact which are indispensable and others which are not essential and after referring to State of Florida *v.* United States, 282 U. S. 194, 51 S. Ct. 119, 75 L. Ed. 291, said: 'In the Florida case the legal distinction was pointed out between what may be termed quasi-jurisdictional findings, there held to be indispensable, and the "complete statement of the grounds of the Commission's determination" which was declared in Beaumont, S. L. & W. Ry. Co. *v.* United States, 282 U. S. 74, 86, 51 S. Ct. 1, 75 L. Ed. 221, to be desirable for a proper consideration of the case in the courts. The lack of such a complete statement, while always regrettable, because unnecessarily increasing the labor of the review-

ing court (compare Virginian Ry. *v.* United States, 272 U. S. 658, 675, 47 S. Ct. 222, 71 L. Ed. 463), is not fatal to the validity of the order. It is true that formal and precise findings are not required, under section 14 (1) of the Interstate Commerce Act * * *, which declares that the report "shall state the conclusions of the Commission together with its decision." Compare Manufacturers' Ry. Co. *v.* United States, 246 U. S. 457, 487, 38 S. Ct. 383, 62 L. Ed. 831; Meeker (& Co.) *v.* Lehigh Valley R. Co., 236 U. S. 412, 428, 35 S. Ct. 328, 59 L. Ed. 644, Ann. Cas. 1916B, 691, P.U.R. 1915D 1072. That provision relieves the Commission from making comprehensive findings of fact similar to those required by Equity Rule 70½ * * *. But section 14 (1) does not remove necessity of making, where orders are subject to judicial review, quasi-jurisdictional findings essential to their constitutional or statutory validity." ' (293 U. S. 454, 55 S. Ct. 273.)

In the light of this authority, it appears that a finding of the ultimate basic fact is all that is indispensable to the Commission's exercise of the statutory power invoked in this proceeding. As a prerequisite to the validity of its orders, the Commission is not compelled to report special findings as to the underlying or subordinate facts such as were formerly required by Equity Rule 70½, 28 U. S. C. A. § 723 appendix, and now required by Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c. The only basic or quasi-jurisdictional fact, a finding in respect to which is essential to the exercise of the statutory power of the Commission to reduce the established rate involved in this case and prescribes a lower one for the future, is the fact that the subsisting rate 'is or will be unjust or unreasonable.' Sec. 15 (1) of the Act, 49 U. S. C. A. § 15 (1)." (Italics ours.)

Even though § 8(b) of the Administrative Procedure Act, 5 U. S. C. A. § 1007(b) may now be applicable to the decisions of the Interstate Commerce Commission, we think

that the Commission's report contains findings sufficient to support the order. Section 8(b) provides:

> "* * * The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate ruling, order, sanction, relief, or denial thereof."

The Commission here made the ultimate findings as required by the statute, and these ultimate findings are supported by subsidiary findings. The Commission's report describes the authority sought by the application, the existing routes of Virginia Dare, the prior authority, subject to the restriction, granted by the Commission, the reopening of the case upon petition of Norfolk Southern, and the Examiner's conclusion. It then points out that the findings that Virginia Dare is fit and able to conduct the services at issue and that public convenience and necessity require services by Virginia Dare at all intermediate points between Sligo and Norfolk are unquestioned and justified by the record.

Interventions by public bodies were next referred to and the evidence in support of the application was summarized. The testimony of bus drivers, indicating that on numerous occasions they have been flagged at intermediate points between Elizabeth City and Sligo, by persons seeking passage to Norfolk or to points between Sligo and Norfolk, and the temporary authority under which applicant continued service for about five months between Elizabeth City and Sligo to Norfolk were referred to. The testimony of five public witnesses in support of the application was reviewed.

Next, the Commission reviewed the testimony of eighteen public witnesses appearing on behalf of protestant Norfolk Southern. Schedules showing north and southbound service

rendered by Norfolk Southern over its two routes between Norfolk and Elizabeth City are referred to. Operating and statistical exhibits introduced by the Norfolk Southern were reviewed, indicating "that there has been no appreciable overcrowding in recent months." Declining passenger revenue of the Norfolk Southern was referred to and the extent of the decline in recent years shown.

Virginia Dare's contention that it had been unduly limited in its presentation of its testimony and the scope of its cross-examination was overruled, and the Commission stated "in reaching our conclusions, we have considered all the evidence of record." The Commission's report then contains the following important holding:

> "In several instances we have stated that a 'closed door' passenger operation which prevents any part of the public from riding buses which are operated daily over a regular route is difficult to justify. Generally speaking, restrictions such as contained in applicant's certificate are not in the public interest and can be justified only by unusual circumstances which are not here present. True, Norfolk Southern is now operating at a deficit, but there is no showing that the deficit results primarily from its operations over the Norfolk-Sligo-Elizabeth City route. In our opinion, there is no convincing evidence that removal of the restriction would deprive Norfolk Southern of a material amount of traffic. In any event, we have often found that the public should not be deprived of a new or improved service merely because it might divert some traffic from other carriers. In the circumstances, we conclude that the public convenience and necessity require the rendition by applicant of an unrestricted interstate service."

There was no necessity for the Commission to make any specific finding concerning the inadequacy of the existing service. See *Davidson Transfer and Storage Co.* v. *United States*, 42 F. Supp. 215, affirmed 317 U. S. 587; *A., B. & C. Motor Transp. Co.* v. *U. S.*, 69 F. Supp. 166, 169. Sec-

tion 207(b) of the Interstate Commerce Act, 49 U. S. C. A. § 307(b), states:

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

Competition among public carriers may be in the public interest and the carrier first in business has no immunity against future competition. See Chesapeake & Ohio Ry. Co. v. United States, 283 U. S. 35, 42; North Coast Transp. Co. v. United States, 54 F. Supp. 448, 451, affirmed 323 U. S. 668. Even though the resulting competition causes a decrease of revenue from one of the carriers, the public convenience and necessity may be served by the issuance of a certificate to a new competitor. Lang Transp. Corp. v. United States, 75 F. Supp. 915, 929; Inland Motor Freight v. United States, 36 F. Supp. 885.

As Circuit Judge Parker stated in Beard-Laney v. United States, 83 F. Supp. 27, 32, affirmed 338 U. S. 803:

> "It is for the Commission, not the court, to say what public convenience and necessity requires and whether these will be better served by licensing an additional carrier than by permitting those already licensed to expand their facilities."

In lifting the restriction here, the Commission was not instituting a new service but was simply permitting an improvement of an existing service. Thus the language of Hall & Sons v. United States, 88 F. Supp. 596, 602, is applicable:

> "Bearing in mind the Commission's expertness and primary responsibility in weighing the factors affecting public convenience and necessity, and the well-understood limitations on judicial review in this type of case, we cannot say, on the basis of the Commission's findings, that it was irrational to conclude that the present and future public convenience and necessity would be served by the limited enlargement of applicant's existing authority, as provided in the order.

> The word 'necessity' in the broad statutory formula must not be taken too literally, especially in a case like the present, as implying that a transportation crisis of major proportions would ensue unless the application were granted. If that were the meaning, the use of the word 'convenience' would be an obvious superfluity."

(2) The determinations of the Interstate Commerce Commission, like those of other administrative bodies, will be upheld if within the Commission's statutory power and supported by substantial evidence that the public convenience and necessity are served by the order or certificate. See Chicago, St. Paul, Minneapolis & Omaha Ry. Co. v. United States, 322 U. S. 1, 3; United States v. Wabash R. R. Co., 321 U. S. 403, 408; Interstate Commerce Commission v. Hoboken Manufacturers' R. R. Co., 320 U. S. 368, 378; Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U. S. 541, 547.

The courts have also stated the rule in these words:

> "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

Rochester Telephone Corp. v. United States, 307 U. S. 125, 146; Mississippi Valley Barge Line Co. v. United States, 292 U. S. 282, 286.

In Virginian Ry. Co. v. United States, 271 U. S. 658, 666, Mr. Justice Brandeis stated:

> "This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it."

See, also, Western Paper Makers' Chemical Co. v. United States, 271 U. S. 268, 271.

In addition, there is a presumption that the Commission has properly performed its official duties, and this presumption supports its official acts. Baltimore & Ohio R. R. Co. v. United States, 298 U. S. 349, 358-9. Cf. Federal

Power Commission v. Hope Natural Gas Co., 320 U. S. 591, 602; United States v. Chemical Foundation, 272 U. S. 1, 14-15.

The credibility of witnesses and the weight of the testimony are also for the Commission to determine and are not the concern of the courts. See Lang Transp. Co. v. United States, 75 F. Supp. 915, 930, and the authorities there cited.

Under the applicable law it is not necessary for us to present a detailed analysis of the evidence. It will suffice to state that there was evidence that the existing system caused confusion, that many people were refused transportation, that there had been complaints from passengers, that the buses of Norfolk S uthern were crowded, that a petition for better services was filed and that the lifting of the restriction would remove ill feeling and afford transportation between Manteo and neighboring points and intermediate stops between Norfolk and Elizabeth City without the necessity of changing buses. This evidence is substantial and supports the Commission's order.

The injunction is denied and the suit dismissed.

Dismissed.

I concur.

STERLING HUTCHESON,
U. S. District Judge.

MAY 16, 1950.

BRYAN, *District Judge,* dissenting:

In my opinion the report of Division 5, dated August 15, 1949, is invalid because it fails to make any basic findings to sustain its ultimate finding. I cannot agree with the Court's opinion that an ultimate finding is all that is required by law; U. S. v. Pierce Auto Lines, 327 U. S. 515, 533; Hudson Transit Lines v. U. S., 82 F. Supp. 153, 155, aff. 338 U.S. 802; Administrative Procedure Act sec. 8(b), 5 U.S.C.A. 1007(b); and I search the record in vain for subordinate findings.

To be sure, there are summaries of evidence and observations. If they be taken as findings they deny the Commis-

sion's conclusion. Thus the report recites that, as to the confusion in flagging the buses, applicant's drivers say, "the tendency is for fewer persons" to do so; as to Norfolk-Southern buses, even applicant's witnesses believe them "satisfactory" although crowded "on some occasions x x x during the war years"; as to schedules, the frequency of service is shown to be ample; and as to Norfolk-Southern's deficit, it is "through no fault of its own" and it has "an expense factor below the average" and "its management x x x good and efficient". Again, the observations that "there is no showing that the deficit results from its operations" over the route in question, and "there is no convincing evidence that removal of the restriction would deprive Norfolk-Southern of a material amount of traffic" are valueless. Too obvious to need proof is the proposition that withdrawal of the restriction would neither lessen the deficit, nor lessen the decline of traffic over the Norfolk-Southern. So no penultimate "finding" sustains the ultimate.

Consequently, I can find no "rational basis" for the order. The Commission presumably had ground to impose the restriction. I would like to know its ground for cancelling it.

I would enjoin the enforcement of the present order until the Commission makes the findings required by law and enters its order thereon.

MAY 22, 1950.

Office-Supreme Court, U. S.
FILED
AUG 18 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 254

NORFOLK SOUTHERN BUS CORPORATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION AND VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Defendants.

MOTION TO AFFIRM

The appellee Virginia Dare Transportation Company, Incorporated, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the District Court be affirmed.

This is a direct appeal from the final decree entered June 14, 1950, of a specially constituted District Court of three Judges, convened pursuant to Sections 2284 and 2325 of the Judicial Code as Revised September 1, 1948, (28 U. S. C. 2284, 2325) dismissing Appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. On May 22, 1950 the specially constituted District Court rendered an opinion, unreported, with District Judge Bryan dissenting. The appeal was allowed on

July 14, 1950 and the appeal papers received on July 17, 1950.

The Interstate Commerce Commission has filed herein motion to affirm and has set forth therein the necessary facts and law in support thereof. This Appellee hereby concurs in the contentions in said motion to affirm and adopts the reasoning thereof.

This Appellee respectfully submits that the judgment of the District Court should be affirmed.

I. M. Bailey,
P. A. Agelsto, Jr.,
Attorneys for Virginia Dare Transportation Company, Incorporated, Appellee.

(9564)

In the United States District Court for the Eastern District of Virginia—Norfolk Division

CIVIL ACTION NO. 1084

NORFOLK SOUTHERN BUS CORPORATION, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND VIRGINIA DARE TRANSPORTATION CO., INC., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree, entered on June 14, 1950,[1] by a specially constituted district court of three judges convened pursuant to Sections 1253, 2284 and 2325 of Title 28 of the United States Code, dismissing appellant's complaint seeking to set aside an order

[1] The Court rendered its opinion on May 22, 1950, District Judge Bryan dissenting.

of the Interstate Commerce Commission. Appeal was allowed on July 14, 1950, and appeal papers were served on July 17, 1950.

The factual situation leading to the issuance of the report and orders involved in this appeal and the history of the proceedings before the Commission may be briefly summarized. Prior to the inception of the Commission proceedings leading to the issuance of the report and orders here assailed, appellee Virginia Dare Transportation Co., Inc. had been certificated by the Commission as a common carrier by motor vehicle in the transportation of passengers between Manteo and Elizabeth City, North Carolina, serving Sligo, North Carolina as an intermediate point. Acting on an application by Virginia Dare the Commission on December 5, 1946 (46 M. C. C. 842) authorized the issuance of a certificate granting it the right to operate a route between Manteo, North Carolina, and Norfolk, Virginia, serving Sligo, North Carolina as an intermediate point. Appellant operates a route between Elizabeth City and Norfolk, Virginia, via Sligo and Virginia Dare's route from Sligo to Norfolk is therefore competitive with appellant's route. By the 1946 extension of its operating rights, Virginia Dare was able to render through service between the points named whereas formerly passengers destined to such points were required to use the services of the appellant by interchange

at Sligo, North Carolina for transportation to or from Norfolk. In authorizing this extension of operations the Commission included a restriction that:

> The service authorized herein is subject to the restriction that no passengers or other traffic shall be transported between Norfolk, on the one hand, and, on the other, points on the said carrier's presently authorized route between Sligo and Elizabeth City, including Elizabeth City.

Although the grant of the additional authority gave Virginia Dare a through route between Manteo and Norfolk via Sligo, the restriction imposed prevented Virginia Dare from furnishing any service to and from Norfolk on the one hand, and, on the other, points on Virginia Dare's previously authorized route between Sligo and Elizabeth City, including the latter point. In motor carrier parlance Virginia Dare was thus required to conduct a "closed door" operation along that portion of its route where the restriction applied.

No attack was made on the Commission's order of December 5, 1946 authorizing the additional service subject to the restrictions, and Virginia Dare commenced operations pursuant to the authority granted. In the course of such operations Virginia Dare maintained schedules using the through direct route between Manteo, Sligo and Norfolk, but some of its schedules between

Manteo and Norfolk involved operation over a combination of its routes, such as from Manteo to Sligo to Elizabeth City, and thence from Elizabeth City to Sligo to Norfolk. It will be observed that the restriction imposed by the 1946 order related specifically to the latter described operations and prohibited the pickup and discharge of passengers at points between Elizabeth City and Sligo in connection with service to or from Norfolk, Virginia.

After several months' operations in this manner, Virginia Dare petitioned the Commission to reopen the proceedings for consideration of a request to remove the "closed door" restriction. Acting on such petition, the Commission on January 7, 1948, reopened the proceedings, and hearings were held on February 25 and May 3 and 4, 1948. Appellant appeared in the reopened proceedings and protested the lifting of the restriction. On August 15, 1949 Division 5 issued its report and order authorizing the removal of the described restriction, basing its action on the finding that the same was required by public convenience and necessity. On November 7, 1949 the entire Commission denied appellant's petition for reconsideration of the report and order of Division 5, and on December 22, 1949 appellant instituted the present action.

Appellees submit that this appeal involves no substantial questions. The issues presented relate

only to the adequacy of the findings made by the Commission and the sufficiency of the evidence supporting such findings. The lack of merit of appellant's contentions is clearly demonstrated in the opinion of Judge Dobie for the majority of the court below. As stated there, the Commission in the exercise of a function specifically entrusted to its expert judgment and administrative discretion, *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 535, 536; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65, 69–70; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 240, 241; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 482, 490; *Beard-Laney* v. *United States*, 83 F. Supp. 27, 32, affirmed, 338 U. S. 803, found that public convenience and necessity required the lifting of the restriction on Virginia Dare's operations. In finding "that the public convenience and necessity require the rendition by applicant of an unrestricted interstate service," and "that applicant is fit, willing, and able properly to perform such service," the Commission complied fully with the requirements of Section 14 (1) of the Interstate Commerce Act (24 Stat. 384, as amended, 49 U. S. C. 14 (1)). *United States* v. *B & O Railroad Co.*, 293 U. S. 454, 463; *Florida* v. *United States*, 282 U. S. 194; *Chicago, B & Q R. Co.* v. *United States*, 60 F. Supp. 580, 582–584, 585 (E. D. Ky.).

As noted by the District Court, the Commission in partial support of its basic finding stated above held that:

> * * * a "closed door" passenger operation which prevents any part of the public from riding buses which are operated daily over a regular route is difficult to justify. Generally speaking, restrictions such as contained in applicant's certificate are not in the public interest and can be justified only in unusual circumstances which are not here present.

It was further noted that the record contained evidence showing that the service conducted under the restriction caused confusion and required the denial of transportation of would-be passengers, sometimes in inclement weather, establishing that the lifting of the restrictions would remove ill feeling and enable the rendition of an improved service to the public. It is submitted that the existence of such evidence supported the basic finding that removal of the restriction was required in the interest of public convenience and necessity. The suggestion of the dissenting judge that greater specificity was required either under the Interstate Commerce Act, or Section 8 (b)[2] of the Administrative Procedure Act, 60 Stat. 242, 5 U. S. C. 1007 (b), cannot be sustained.

[2] Section 8 (b) requires that all decisions shall "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor."

For the foregoing reasons, we submit that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgement of the District Court should be affirmed.

ARNOLD RAUM,
Acting Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.
JULY 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950

Office-Supreme Court, U. S.
FILED
AUG 18 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 254

NORFOLK SOUTHERN BUS CORPORATION,
Plaintiff,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION AND VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Defendants.

MOTION TO AFFIRM

The appellee Virginia Dare Transportation Company, Incorporated, pursuant to Rule 12, Paragraph 3 of the Revised Rules of the Supreme Court of the United States, moves that the judgment of the District Court be affirmed.

This is a direct appeal from the final decree entered June 14, 1950, of a specially constituted District Court of three Judges, convened pursuant to Sections 2284 and 2325 of the Judicial Code as Revised September 1, 1948, (28 U. S. C. 2284, 2325) dismissing Appellant's complaint seeking to set aside an order of the Interstate Commerce Commission. On May 22, 1950 the specially constituted District Court rendered an opinion, unreported, with District Judge Bryan dissenting. The appeal was allowed on

July 14, 1950 and the appeal papers received on July 17, 1950.

The Interstate Commerce Commission has filed herein motion to affirm and has set forth therein the necessary facts and law in support thereof. This Appellee hereby concurs in the contentions in said motion to affirm and adopts the reasoning thereof.

This Appellee respectfully submits that the judgment of the District Court should be affirmed.

I. M. Bailey,
P. A. Agelsto, Jr.,
Attorneys for Virginia Dare Transportation Company, Incorporated, Appellee.

(9564)

In the United States District Court for the Eastern District of Virginia—Norfolk Division

CIVIL ACTION No. 1084

NORFOLK SOUTHERN BUS CORPORATION, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND VIRGINIA DARE TRANSPORTATION CO., INC., DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees United States and Interstate Commerce Commission, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the judgment and decree of the District Court be affirmed.

This is a direct appeal from the final judgment and decree, entered on June 14, 1950,[1] by a specially constituted district court of three judges convened pursuant to Sections 1253, 2284 and 2325 of Title 28 of the United States Code, dismissing appellant's complaint seeking to set aside an order

[1] The Court rendered its opinion on May 22, 1950, District Judge Bryan dissenting.

of the Interstate Commerce Commission. Appeal was allowed on July 14, 1950, and appeal papers were served on July 17, 1950.

The factual situation leading to the issuance of the report and orders involved in this appeal and the history of the proceedings before the Commission may be briefly summarized. Prior to the inception of the Commission proceedings leading to the issuance of the report and orders here assailed, appellee Virginia Dare Transportation Co., Inc. had been certificated by the Commission as a common carrier by motor vehicle in the transportation of passengers between Manteo and Elizabeth City, North Carolina, serving Sligo, North Carolina as an intermediate point. Acting on an application by Virginia Dare the Commission on December 5, 1946 (46 M. C. C. 842) authorized the issuance of a certificate granting it the right to operate a route between Manteo, North Carolina, and Norfolk, Virginia, serving Sligo, North Carolina as an intermediate point. Appellant operates a route between Elizabeth City and Norfolk, Virginia, via Sligo and Virginia Dare's route from Sligo to Norfolk is therefore competitive with appellant's route. By the 1946 extension of its operating rights, Virginia Dare was able to render through service between the points named whereas formerly passengers destined to such points were required to use the services of the appellant by interchange

at Sligo, North Carolina for transportation to or from Norfolk. In authorizing this extension of operations the Commission included a restriction that:

> The service authorized herein is subject to the restriction that no passengers or other traffic shall be transported between Norfolk, on the one hand, and, on the other, points on the said carrier's presently authorized route between Sligo and Elizabeth City, including Elizabeth City.

Although the grant of the additional authority gave Virginia Dare a through route between Manteo and Norfolk via Sligo, the restriction imposed prevented Virginia Dare from furnishing any service to and from Norfolk on the one hand, and, on the other, points on Virginia Dare's previously authorized route between Sligo and Elizabeth City, including the latter point. In motor carrier parlance Virginia Dare was thus required to conduct a "closed door" operation along that portion of its route where the restriction applied.

No attack was made on the Commission's order of December 5, 1946 authorizing the additional service subject to the restrictions, and Virginia Dare commenced operations pursuant to the authority granted. In the course of such operations Virginia Dare maintained schedules using the through direct route between Manteo, Sligo and Norfolk, but some of its schedules between

Manteo and Norfolk involved operation over a combination of its routes, such as from Manteo to Sligo to Elizabeth City, and thence from Elizabeth City to Sligo to Norfolk. It will be observed that the restriction imposed by the 1946 order related specifically to the latter described operations and prohibited the pickup and discharge of passengers at points between Elizabeth City and Sligo in connection with service to or from Norfolk, Virginia.

After several months' operations in this manner, Virginia Dare petitioned the Commission to reopen the proceedings for consideration of a request to remove the "closed door" restriction. Acting on such petition, the Commission on January 7, 1948, reopened the proceedings, and hearings were held on February 25 and May 3 and 4, 1948. Appellant appeared in the reopened proceedings and protested the lifting of the restriction. On August 15, 1949 Division 5 issued its report and order authorizing the removal of the described restriction, basing its action on the finding that the same was required by public convenience and necessity. On November 7, 1949 the entire Commission denied appellant's petition for reconsideration of the report and order of Division 5, and on December 22, 1949 appellant instituted the present action.

Appellees submit that this appeal involves no substantial questions. The issues presented relate

only to the adequacy of the findings made by the Commission and the sufficiency of the evidence supporting such findings. The lack of merit of appellant's contentions is clearly demonstrated in the opinion of Judge Dobie for the majority of the court below. As stated there, the Commission in the exercise of a function specifically entrusted to its expert judgment and administrative discretion, *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U. S. 515, 535, 536; *Interstate Commerce Commission* v. *Parker*, 326 U. S. 60, 65, 69–70; *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 240, 241; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 482, 490; *Beard-Laney* v. *United States*, 83 F. Supp. 27, 32, affirmed, 338 U. S. 803, found that public convenience and necessity required the lifting of the restriction on Virginia Dare's operations. In finding "that the public convenience and necessity require the rendition by applicant of an unrestricted interstate service," and "that applicant is fit, willing, and able properly to perform such service," the Commission complied fully with the requirements of Section 14 (1) of the Interstate Commerce Act (24 Stat. 384, as amended, 49 U. S. C. 14 (1)). *United States* v. *B & O Railroad Co.*, 293 U. S. 454, 463; *Florida* v. *United States*, 282 U. S. 194; *Chicago, B & Q R. Co.* v. *United States*, 60 F. Supp. 580, 582–584, 585 (E. D. Ky.).

As noted by the District Court, the Commission in partial supporf of its basic finding stated above held that:

> * * * a "closed door" passenger operation which prevents any part of the public from riding buses which are operated daily over a regular route is difficult to justify. Generally speaking, restrictions such as contained in applicant's certificate are not in the public interest and can be justified only in unusual circumstances which are not here present.

It was further noted that the record contained evidence showing that the service conducted under the restriction caused confusion and required the denial of transportation of would-be passengers, sometimes in inclement weather, establishing that the lifting of the restrictions would remove ill feeling and enable the rendition of an improved service to the public. It is submitted that the existence of such evidence supported the basic finding that removal of the restriction was required in the interest of public convenience and necessity. The suggestion of the dissenting judge that greater specificity was required either under the Interstate Commerce Act, or Section 8 (b)[2] of the Administrative Procedure Act, 60 Stat. 242, 5 U. S. C. 1007 (b), cannot be sustained.

[2] Section 8 (b) requires that all decisions shall "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor."

For the foregoing reasons, we submit that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgement of the District Court should be affirmed.

ARNOLD RAUM,
Acting Solicitor General.
DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

JULY 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950

No. 254

AUG 19 19

SUPREME COURT of the UNITED STATES

NORFOLK SOUTHERN BUS CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Appellees.

BRIEF OPPOSING MOTIONS OF APPELLEES TO AFFIRM

Arthur J. Wearn
S. Bonnell Brand
Albert S. Horne
Terminal Building
Norfolk, Virginia
James G. Martin
Western Union Building
Norfolk, Virginia
Counsel for Norfolk Southern Bus Corporation

Lawyers Publishing Co., Inc.—Richmond, Va.

SUBJECT INDEX

	Page
Statement	1
Argument	2

TABLE OF CITATIONS

Cases

U. S. v. Pierce Auto Lines, 327 U. S. 515, 533	3

Secondary Authorities

5 U. S. C. A. Section 1007 (b)	3

SUPREME COURT
of the
UNITED STATES

NORFOLK SOUTHERN BUS CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Appellees.

BRIEF OPPOSING MOTIONS OF APPELLEES TO AFFIRM

This is a direct appeal from a decree of a Three Judge Court, entered June 14, 1950, and the sole question on the motions to affirm seems to be the claim of appellees that no substantial questions are involved.

We respectfully submit that very substantial questions are involved, and questions of the gravest importance to Norfolk Southern Bus Corporation.

The decision of the Three Judge Court, one Judge dissenting, holding valid the ruling of the Interstate Commerce Commission permits the Virginia Dare Transportation Company, Incorporated, to compete directly with Norfolk Southern Bus Corporation in the carriage of passengers between Norfolk, Virginia, and

Elizabeth City, North Carolina, very important points in the carriage of passengers, which had been properly and adequately served by Norfolk Southern Bus Corporation for many years.

By its previous decision of December 5, 1946, the Commission had refused to allow such competition by Virginia Dare Transportation Company, Incorporated, and yet by the present decision it arbitrarily allows this competition to the great detriment of Norfolk Southern Bus Corporation, without any reason, and without any basic findings justifying the Commission's reversal of position.

This appeal involves two substantial questions, which are:

(1) We maintain that there was no substantial evidence to support the decision of the Interstate Commerce Commission in removing the restriction which it had previously held proper preventing Virginia Dare Transportation Company, Incorporated, from competing with Norfolk Southern Bus Corporation between Norfolk and Elizabeth City. On the Contrary, we submit that the evidence overwhelmingly showed that Norfolk Southern was properly and adequately serving the public and that to allow Virginia Dare to compete was totally unnecessary and unjust.

(2) We submit that the decision of the Commission did not set forth any basic findings justifying its ruling. That if any basic findings can be considered as contained in the decision they tended against the decision and show no justification therefor.

The Administrative Procedure Act requires basic findings, and the dissenting opinion in the present case demonstrates the lack of such basic findings.

We call especial attention to said dissenting opinion. In *U.. S.* v. *Pierce Auto Lines*, 327 U. S. 515, 533, the Court said:

> "What was obviously meant was that such an ultimate finding was not enough, as of course it was not, see *Florida* v. *United States, Supra,* (282 U. S. 194) in the absence of a basic finding to support it; and that there was no such finding."

The language of 5 U.S.C.A., Section 1007 (b) is:

> "(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

It also should be noted that the cases relied on by appellees were decided prior to the effective date of the Administrative Procedure Act, June 11, 1946.

That substantial questions are involved in the case at bar, seems also emphasized by the closeness of the decision, to-wit:

The Examiner decided for Norfolk Southern; Division Five of the Interstate Commerce Commission decided against Norfolk Southern by a vote of two to one and the Three Judge Court decided against Norfolk Southern by a vote of two to one:

We submit that the motions to affirm should not be granted; and that the case should be heard in due course.

S. Burnell Bragg
Arthur J. Winder
Albert S. Holtz
Terminal Building
Norfolk, Virginia
James G. Martin
Western Union Building
Norfolk, Virginia
Counsel for Norfolk Southern Bus Corporation

No. 254

AUG 18 19

SUPREME COURT
of the
UNITED STATES

NORFOLK SOUTHERN BUS CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Appellees.

BRIEF OPPOSING MOTIONS OF APPELLEES TO AFFIRM

Andrew J. Wesson
J. Rooney, Bragg
Andrew F. Bruce
Terminal Building
Norfolk, Virginia

James C. Mason
Western Union Building
Norfolk, Virginia
Counsel for Norfolk Southern Bus Corporation

Lawyers Publishing Co., Inc.—Richmond, Va.

SUBJECT INDEX

	Page
Statement	1
Argument	2

TABLE OF CITATIONS

Cases

U. S. v. Pierce Auto Lines, 327 U. S. 515, 533	3

Secondary Authorities

5 U. S. C. A. Section 1007 (b)	3

SUPREME COURT
of the
UNITED STATES

NORFOLK SOUTHERN BUS CORPORATION,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and VIRGINIA DARE TRANSPORTATION COMPANY, INCORPORATED,
Appellees.

BRIEF OPPOSING MOTIONS OF APPELLEES TO AFFIRM

This is a direct appeal from a decree of a Three Judge Court, entered June 14, 1950, and the sole question on the motions to affirm seems to be the claim of appellees that no substantial questions are involved.

We respectfully submit that very substantial questions are involved, and questions of the gravest importance to Norfolk Southern Bus Corporation.

The decision of the Three Judge Court, one Judge dissenting, holding valid the ruling of the Interstate Commerce Commission permits the Virginia Dare Transportation Company, Incorporated, to compete directly with Norfolk Southern Bus Corporation in the carriage of passengers between Norfolk, Virginia, and

Elizabeth City, North Carolina, very important points in the carriage of passengers, which had been properly and adequately served by Norfolk Southern Bus Corporation for many years.

By its previous decision of December 5, 1946, the Commission had refused to allow such competition by Virginia Dare Transportation Company, Incorporated, and yet by the present decision it arbitrarily allows this competition to the great detriment of Norfolk Southern Bus Corporation, without any reason, and without any basic findings justifying the Commission's reversal of position.

This appeal involves two substantial questions, which are:

(1) We maintain that there was no substantial evidence to support the decision of the Interstate Commerce Commission in removing the restriction which it had previously held proper preventing Virginia Dare Transportation Company, Incorporated, from competing with Norfolk Southern Bus Corporation between Norfolk and Elizabeth City. On the Contrary, we submit that the evidence overwhelmingly showed that Norfolk Southern was properly and adequately serving the public and that to allow Virginia Dare to compete was totally unnecessary and unjust.

(2) We submit that the decision of the Commission did not set forth any basic findings justifying its ruling. That if any basic findings can be considered as contained in the decision they tended against the decision and show no justification therefor.

The Administrative Procedure Act requires basic findings, and the dissenting opinion in the present case demonstrates the lack of such basic findings.

We call especial attention to said dissenting opinion.

In *U.. S.* v. *Pierce Auto Lines*, 327 U. S. 515, 533, the Court said:

> "What was obviously meant was that such an ultimate finding was not enough, as of course it was not, see *Florida* v. *United States, Supra,* (282 U. S. 194) in the absence of a basic finding to support it; and that there was no such finding."

The language of 5 U.S.C.A., Section 1007 (b) is:

> "(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof."

It also should be noted that the cases relied on by appellees were decided prior to the effective date of the Administrative Procedure Act, June 11, 1946.

That substantial questions are involved in the case at bar, seems also emphasized by the closeness of the decision, to-wit:

The Examiner decided for Norfolk Southern; Division Five of the Interstate Commerce Commission decided against Norfolk Southern by a vote of two to one and the Three Judge Court decided against Norfolk Southern by a vote of two to one:

We submit that the motions to affirm should not be granted; and that the case should be heard in due course.

S. Burnell Bragg
Arthur J. Winder
Albert S. Holtz
Terminal Building
Norfolk, Virginia
James G. Martin
Western Union Building
Norfolk, Virginia
Counsel for Norfolk Southern Bus Corporation